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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROGER M. GRACE, Plaintiff and Appellant, v. EBAY, INC., Defendant and Respondent.	B168765 (Los Angeles County Super. Ct. No. BS288836)

Appeal from a judgment of the Superior Court of Los Angeles County. Thomas Willhite, Jr., Judge. Affirmed.

Roger M. Grace, in pro per, and Lisa Grace-Kellogg for Plaintiff and Appellant.

Cooley Godward, Michael G. Rhodes and Andrea S. Bitar for Defendant and Respondent.

Plaintiff Roger M. Grace ("plaintiff") appeals from a judgment of dismissal entered after the trial court sustained without leave to amend the demurrer to plaintiff's complaint filed by defendant eBAY Inc. ("defendant"). Plaintiff's suit seeks to hold defendant liable for allegedly defamatory material published on defendant's internet website by another defendant, Tim Neeley. The trial court concluded that under federal communications law concerning computer services, plaintiff's allegations cannot rise to a cause of action against defendant. We agree, and we affirm the judgment.

BACKGROUND OF THE CASE

1. *The Complaint*

According to plaintiff's complaint, defendant has an internet website whereat defendant conducts auctions of sellers' goods. The goods are described on the website and prospective buyers submit bids to defendant by e-mail.

Tim Neeley ("Neeley") is a merchant who utilizes defendant's website to sell goods. Neeley does business in Los Angeles and utilizes the fictitious business name "Crackerpopp," although he has not complied with the requirements of the fictitious business statute, Business and Professions Code, section 17910.

A person wishing to bid on items at defendant's auction website does so using a computer and internet service provider. Defendant charges the seller for use of its website. Defendant encourages buyers and sellers using its website to leave feedback about their auction transactions, and defendant is aware that users leave false and defamatory feedback in response to negative remarks made about them by others, but defendant does not warn of this possibility nor does it take action once told of the

presence on its website of defamatory matter. Users of defendant's services have "feedback profiles."

Plaintiff was the successful bidder on items offered for sale by Neeley. Plaintiff left negative feedback about some of those transactions and in return, Neeley placed the following remark in plaintiff's feedback profile: "complaint: should be banned from ebay!!!! dishonest all the way!!!!" This allegation about plaintiff is harmful, malicious, known by Neeley to have no factual support and defamatory.

Although plaintiff informed defendant about the false and defamatory nature of Neeley's comments, defendant has refused to remove the comments. Defendant, on a daily basis, is publishing the false and defamatory comments made by Neeley because defendant keeps the comments on its website, and is doing so with knowledge of the falsity of the comments or in reckless disregard of the truth.

Plaintiff entered into a "user agreement" posted by defendant on defendant's website, and sellers must also enter into such a user agreement with defendant. Paragraph 6.2 (e) of the user agreement provides that information provided by the user of the website must not be defamatory. Paragraph 9 of the user agreement gives defendant rights against a user if defendant, among other things, believes that the users actions may cause financial loss or liability for defendant or its users. One of those rights is to "remove your item listings." However, defendant has a policy against removing feedback if removal is based on its false and defamatory nature, but defendant does not mention that policy in its user agreement, and a person using the website is a third party beneficiary of these user agreements and would reasonably expect defendant to remove

false and defamatory matter. Defendant breached its user agreement with plaintiff by not removing Neeley's false and defamatory remarks about plaintiff after plaintiff made a demand that plaintiff do so. Having a policy of refusing to remove libelous matter from its website is a violation of California's statute against unfair business practices, Business and Professions Code, section 17200.

Plaintiff sued defendant for libel, breach of contract,[1] and unfair business practices.[2]

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[1] In its extensive written ruling on defendant's demurrer, the trial court stated plaintiff acknowledged in his opposition to the demurrer that his breach of contract claim is moot.

[2] Regarding the unfair business practice allegations, plaintiff asserts that by not withdrawing libel from its website, defendant is engaging in an unfair business practice, in contravention of Business and Professions Code section 17200. As discussed *infra*, a suit based on this allegation is precluded by federal law covering internet use.

The third cause of action also alleges (1) defendant encourages and causes violations of Business and Professions Code section 17910 by encouraging persons to adopt fictitious business names to transact their business, without also admonishing them to comply with the fictitious business name statutes; and (2) defendant "promotes and effects an avoidance of the payment of sales tax by buyers in connection with sales by merchants, such as Neeley." Plaintiff alleges defendant should be enjoined from these alleged violations of state law. The complaint states plaintiff's third cause of action is maintained "in a representative capacity in a private attorney action." Apparently, plaintiff means a private attorney general action.

At the hearing on the demurrer, plaintiff advised the court that in light of the sustaining of the demurrer to the libel cause of action without leave to amend, plaintiff would not seek to amend the third cause of action.

2. *The Demurrer*

Defendant's demurrer asserted plaintiff's causes of action fail to state facts sufficient to state a cause of action because (1) defendant's conduct of which plaintiff complains "is sheltered by the statutory safe harbors of 47 U.S.C. § 230, and hence cannot form the basis of liability," and (2) "the contract that governs the relationship between plaintiff and [defendant] bars claims for the conduct alleged by plaintiff in the complaint."

On April 28, 2003, the trial court sustained the demurrer without leave to amend. Plaintiff filed a motion for reconsideration. The motion was granted, but upon reconsidering the demurrer, the court ruled the demurrer was properly sustained without leave to amend. Judgment of dismissal was signed and filed by the court on June 16, 2003, after which plaintiff filed this timely appeal.

CONTENTIONS ON APPEAL

Plaintiff contends the trial court erred in finding that the federal statute upon which defendant relied requires the sustaining of the demurrer without leave to amend. Plaintiff further contends he should have been permitted to amend his complaint to state a challenge to the constitutionality of the federal statute.

DISCUSSION

1. *Standard of Review*

A demurrer tests the sufficiency of the allegations in a complaint as a matter of law. (*Pacifica Homeowners' Assn*. v. *Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1151.) We review the sufficiency of the challenged complaint de

novo. (*Coopers & Lybrand* v. *Superior Court* (1989) 212 Cal.App.3d 524, 529.) We accept as true the properly pleaded allegations of fact in the complaint, but not the contentions, deductions or conclusions of fact or law. (*Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 318.) We also accept as true facts which may be inferred from those expressly alleged. (*Marshall* v. *Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We consider matters which may be judicially noticed, and we "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank* v. *Kirwan*, *supra*, 39 Cal.3d at p. 318.) We do not concern ourselves with whether the plaintiff will be able to prove the facts which he alleges in his complaint. (*Parsons* v. *Tickner* (1995) 31 Cal.App.4th 1513, 1521.) The judgment or order of dismissal must be affirmed if any of the grounds for demurrer raised by the defendant is well taken and disposes of the complaint. (*Aubry* v. *Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 967.) It is error to sustain a general demurrer if the complaint states a cause of action under any possible legal theory. (*Ibid*.) It is an abuse of the trial court's discretion to sustain a demurrer without leave to amend if there is a reasonable possibility the plaintiff can amend the complaint to allege any cause of action. To prove abuse of discretion, the plaintiff must demonstrate how the complaint can be amended. Such a showing can first be made to the reviewing court. (*Careau & Co*. v. *Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1386.)

2. *Application of U.S.C. Section 230's Immunity Provisions to This Case*

47 U.S.C. § 230 ("§ 230") provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (§ 230(c)(1).)

"The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." (§ 230(f)(2).)[3]

"The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." (§ 230(f)(3).) Here, Neeley is alleged to be responsible for the creation or development of the information which plaintiff complains is defamatory.

By its terms, section 230(c)(1) protects both providers and users of an interactive computer service from being treated as the publisher or speaker of information provided by another information content provider. "Section 230(c)(1) thus immunizes providers of

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[3] Defendant's explanation of its status is as follows. "[Defendant] operates a host of computer servers, which its users access to post their items for sale, to review others' items for purchase, and to post and review comments made by others in the Feedback Forum. In performing these functions, [defendant] is thus acting as a provider of a 'service [or] system . . . that provides or enables computer access by multiple users to [its] computer server[s].' 47 U.S.C.§ 230(f)(2).".

interactive computer services (service providers) and their users from causes of action asserted by persons alleging harm caused by content provided by a third party. This form of immunity requires (1) the defendant be a provider or user of an interactive computer service; (2) the cause of action treat the defendant as a publisher or speaker of information; and (3) the information at issue be provided by another information content provider." (*Gentry* v. *eBAY, Inc*. (2002) 99 Cal.App.4th 816, 830 ["*Gentry*"].)

The *Gentry* court stated that defendant eBAY was an interactive computer service provider. (*Gentry*, *supra*, 99 Cal.App.4th at p. 831, fn. 7.)[4] Section 230 thus precluded defendant from being treated as the seller of forged autographed sports items that were in fact sold by a third party. (*Gentry*, at p. 831.) Thus, eBay could not be treated as "the publisher or speaker" of the false representations made by the selling third parties. Under section 230, eBay is not responsible for content supplied by other "information content providers [citations].)" (*Ibid.*)

Here, plaintiff's libel cause of action is based on treating defendant as the publisher or speaker of the allegedly defamatory remarks made by Neeley about plaintiff and therefore, such cause of action must fail and the demurrer was properly sustained

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[4] It should be noted that this conclusion was pursuant to a concession made by the appellants in *Gentry* that "for purposes of this appeal," eBay was an interactive service provider. The *Gentry* court, however, stated that such concession was *not* critical to its conclusion. "Even if appellants had not conceded the issue, the allegations of the second amended complaint indicate eBay's Web site enables users to conduct sales transactions, as well as provide information (feedback) about other users of the service. In this way, eBay provides an information service that enables access by multiple users to a computer server and brings it within the broad definition of an interactive computer service provider. [Citation.]" (*Gentry, supra,* 99 Cal.App.4th at p. 831, fn. 7.)

without leave to amend. Section 230 specifically states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (§ 230(e)(3).)

Plaintiff, however, questions the *Gentry* court's statement that defendant is an interactive computer service provider. Plaintiff argues that the *Gentry* court relied on a Washington state case (*Schneider* v. *Amazon.com, Inc*. (2001) 108 Wash. App.454 [31 P.3d37]), and *Schneider* is not only not binding on this court, but it also has no persuasive value because it in turn relied on *Zeran* v. *America Online, Inc*. (4th Cir. 1997) 129 F.3d 327. Plaintiff argues that *Zeran* defined an interactive computer service as a service that offers a connection to the internet as a whole. Thus, plaintiff's argument goes, since defendant does not offer a connection to the internet as a whole, it cannot be an interactive computer service provider. He argues that only internet service providers, such as American OnLine, are providers of interactive computer services.

Assuming for purposes of argument only that plaintiff is correct, plaintiff's argument ignores the *totality* of section 230(c)(1), which states that "[n]o provider *or user* of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (Italics added.) If plaintiff's analysis is correct, then defendant simply drops from being a provider of an interactive computer service to being a user of an interactive computer service in its status as a website (that is, defendant makes use of interactive computer services to obtain customers and facilitate the auctions), but remains within the provisions of section 230(c)(1)'s immunity. (*Batzel* v. *Smith* (9th Cir. 2003) 333 F.3d 1018, 1030-1031.)

Thus, we quote *Gentry* quoting from *Zeran*: " 'None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. . . . Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as *intermediaries* for other parties' potentially injurious messages.' (*Zeran*, *supra*, at pp. 330-331, italics added.)"[5]

As noted in footnote 2, in his third cause of action, plaintiff asserts that by not withdrawing libelous matter from its website, defendant is engaging in an unfair business practice, in contravention of Business and Professions Code section 17200. We agree with the trial court that application of section 230 and *Gentry* to this case precludes that basis of liability as well as liability under the cause of action for libel.

3. *Plaintiff's Offer to Amend the Complaint to Allege that Section 230 Is Unconstitutional As Applied by the Courts Is Not Supported by His Arguments*

Plaintiff's constitutional argument is, in effect, that libel lawsuits are state court matters and should not be interfered with except when such lawsuits impede speech protected by the First Amendment and here, it is section 230, not the First Amendment that defendant and the trial court used to preclude his libel cause of action. However, plaintiff relies on a legal philosophy of protection for a person's reputation that evolved

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[5] In its written ruling on defendant's demurrer, the trial court responded thusly to plaintiff's assertion that *Gentry* was wrongly reasoned: "Dictum or not, this court has independently examined the statute and relevant authorities, and finds *Gentry's* observations sound. Indeed, the reasoning is consistent with the great weight of authority. (See *Gentry*, supra, 99 Cal.App.4th at p. 830, and cases there cited.)"

in a different context than use of the internet. Publishers of newspapers, magazines, books, etc. have the luxury of reviewing and screening what is presented to them for printing and distribution, whereas publication by third persons on websites is instantaneous. Thus, by section 230, Congress sought to limit the defendants in defamation suits to third party "information content providers." (§ 230(c)1).) The fact that plaintiff asserts he is only complaining about defendant's permitting Neeley's comments about him to *remain* on defendant's website does not alter that analysis. Plaintiff is, in effect, asking for what, in established libel law, would be akin to a retraction. However, section 230 precludes liability in the first place, and thus the concept of a "retraction" is at odds with the intent of section 230.

We observe that plaintiff did not need leave to amend his complaint to mount a constitutional challenge to section 320. His written opposition to the demurrer was a proper place to set out his constitutional arguments, and the trial court found he had "fail[ed] to show any reasonable possibility that the statute is unconstitutional."

DISPOSITION

The judgment of dismissal is affirmed. Costs on appeal to defendant.

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CROSKEY, Acting P.J.

We Concur:

KITCHING, J. ALDRICH, J.